

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

MONDAY, THE 22ND OCTOBER 2007 / 30TH ASWINA 1929

WP(C).No. 22951 of 2006(G)

**AGAINST THE ORDER IN EP.155/04 IN
OS.586/1996 of PRINCIPAL SUB COURT,ERNAKULAM**
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PETITIONER:

**P.N.SASEENDRAN, AGED 53 YEARS,
S/O.NARAYANAN, PUTTINGAL PARAMBIL,
KANGARAPADY, VADAKODU.P.O., THRIKKAKARA,
NORTH VILLAGE, ERNAKULAM.**

BY ADV. SRI.T.RAJASEKHARAN NAIR

RESPONDENTS:

**1. SAJI KURIAKOSE,
AGED 40 YEARS, S/O.P.M.KURIAKOSE,
PALLIMALIL HOUSE, VELIELCHAL,
THATTAKAD POST, KEERAMPARA VILLAGE,
KOTHAMANGALAM TALUK.**

**2. THE DIRECTOR VIGILANCE AND
ANTICORRUPTION BUREAU,
THIRUVANANTHAPURAM.**

**BY GOVERNMENT PLEADER SRI. P. SHYSON P. MANGUSHA.
R1 BY ADV. SRI.P.K.BEHANAN**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 22/10/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

APPENDIX

- EXT. P1 TRUE COPY OF THE JUDGMENT DATED 18.1.00 IN O.S.586/96
PASSED BY THE PRINCIPAL SUB COURT.**
- EXT.P2 TRUE COPY OF THE AGREEMENT EXECUTED BY P.V.KURIAKOSE
IN FAVOUR OF THE PETITIONER.**
- EXT.P3 TRUE COPY OF THE EXECUTION PETITION AS E.P.155/04 IN
OS 586/96 FILED BY THE RESPONDENT BEFORE THE
EXECUTION COURT.**
- EXT.P4 TRUE COPY OF THE PETITION AS IA 3725/04 IN IA 695/00 IN
OS 586/96 FILED BY THE PETITIONER.**
- EXT.P4(A) TRUE COPY OF THE PETITION AS IA 3726/04 IN IA 695/00 IN
OS 586/96 FILED BY THE PETITIONER.**
- EXT.P5 TRUE COPY OF THE COMMON ORDER PASSED IN IA 3725/04
IN IA 695/00 IN OS 586/96 FILED BY THE PETITIONER.**
- EXT.P5(A) TRUE COPY OF THE COMMON ORDER PASSED IN IA 3726/04
IN IA 695/00 IN OS 586/96 FILED BY THE PETITIONER.**

[True copy]

P.A. to Judge.

M.N. KRISHNAN, J.
= = = = =
W.P.C. NO. 22951 OF 2006
= = = = =
Dated this the 22nd day of October, 2007.

J U D G M E N T

This writ petition is preferred against the order of the Principal Subordinate Judge, Ernakulam in I.A.3725/00 and 3726/00 in O.S. 586/96. The brief facts necessary for the disposal of the writ petition are as follows. The plaintiff has instituted a suit against the defendant for realisation of the amount. The suit was listed for trial on 15.1.00 and as the defendants did not appear and the counsel reported no instructions, the case was decreed ex parte on 18.1.00. Thereafter, the petitioner moved an application I.A.695/00 to set aside the ex parte decree. The said application was allowed on condition that he makes a payment of Rs.500/- within a period of seven days. Since, he did not make the payment, the said I.A. was also dismissed on 28.9.00. Thereafter, in 2004 the petitioner filed two applications one to review the order and another to condone the delay in filing

the applications which is more than four years. The averment is that the counsel did not inform the matter and therefore he was not in a position to know about it and only on receipt of a copy of the execution petition he came to know about the same and therefore requested for condoning the delay. The principles to be followed had been laid down in the decision reported in ***Sreedhara Kurup v. Mickel (1968 KLT 599)*** this Court held that,

“It is largely a matter of wise discretion to be exercised by the Court bearing in mind the wholesome principle that the right of a party to be heard should be negatived only if there is gross negligence or gross carelessness and that if some steps have been taken and application for restoration has been made with some diligence and some evidence adduced making out a sufficient cause for absence, restoration should be ordered, minor misconduct or laches being corrected by the common curative of costs.”

The Court has also cautioned that if a litigant's conduct is equivalent to misconduct or gross negligence such discretion cannot be arbitrarily exercised. At the outset I feel that even these applications are not maintainable in law. I.A.695/00 was an application which was considered on merits and allowed by the Court on payment of costs and in default of payment to dismiss the same. So it was a considered order and there is no question of restoring that petition by a petition under Order 9 Rule 9 or Section 151 of CPC. So far as the delay is concerned I am quiet conscious of the fact that it is not the number of days delay that matters, it is the reason for the delay that matters. Here the whole accusation is against the Advocate who was conducting the case. When a restoration application was filed there also the blame was on the lawyer. Subsequently, when that application was allowed and subsequently dismissed for want of payment of costs then also the blame is on the lawyer. The attempt of

the writ petitioner appears to be that there is no duty cast upon him to enquire what has happened to his case. It is the duty of the lawyer to inform him each and every time what has happened. The Court below has also extracted the answer given by him regarding the previous advocate and he would submit that he was going to examine the advocate to prove his version. The Court found that no attempt was made to examine such advocate in the case. When an ex parte decree is set aside on payment of costs there is a duty cast upon the party to deposit the amount at least, if any, in time to enquire and find out what has happened to the case. He cannot afford to be lethargic and after a period of four years, come forward with a petition accusing the lawyer for everything. There is a duty cast upon him to enquire about his case and that is why I hold that the petitioner has not shown any diligence at all and he has not moved in the right direction for prosecution of the matter

and therefore this is a classical case where one can classify the conduct of the writ petitioner as gross negligence and grave misconduct. When it is so, the judicial discretion cannot be exercised in his favour and there is absolutely no acceptable ground to condone the delay of more than four years in filing the application. Therefore, I do not find any mistake in the decision rendered by the Court below and hence the writ petition is dismissed.

M.N. KRISHNAN, JUDGE.

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